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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

Petitioners,

vs.

THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, *et al.*,

Respondents.

No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc. *et al.*,

Respondents.

No. 550.

BRIEF OF RESPONDENTS, HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, TRUSTEE UNDER THE DEED OF TRUST OF FREDERICK W. WORK, HENRY W. MATHEWS, ALICE L. SCOTT AND RALPH STICKLE, SUCCESSOR TRUSTEE UNDER THE WILL OF ANDREW J. BAUSE, DECEASED.

IDENTITY OF THESE RESPONDENTS.

For six years the owners of certain land trust certificates in the trusteeship covering a parcel of down-town Cleveland real estate had maintained a series of suits

(which they lost in every court), attacking the validity of the trust, and seeking to establish the rights of all certificate holders as general creditors of the defunct The Union Trust Co.

The suits were all brought as class actions on behalf of all the certificate holders. The petitioners in the two cases in this Court are some of the certificate holders who initiated this eight-year plague of litigation, and they still profess to represent all certificate holders, including these respondents.

After the decisions in *Stanley et al. vs. Hart et al.*, 142 O. S. 528; 53 N. E. (2nd) 197, and in *Stanley et al. vs. Cook et al.*, 146 O. S. 348; 66 N. E. (2nd) 207 (hereinafter referred to as the *Hart* case and the *Cook* case) these respondents, and many other owners of the land trust certificates, were confirmed in their belief that the status of all certificate holders had been fixed, all being recognized equally by the trustee as beneficial owners of the trust property, and that in no event could the certificate holders ever become general creditors in the liquidation of The Union Trust Company.

Therefore when part of the same group (hereafter referred to as the "Alburn group") filed the declaratory judgment action and asked and were permitted to intervene as defendants in the quiet title action of the successor trustee, these respondents as the owners of 33 certificates of participation issued under the declaration of trust referred to in the petition and opinions of the lower court (DJR 60, 86; QTR 76),* were allowed to intervene in both cases, asserting that *they* represent the real interest of all the certificate holders; that the litigation fostered by the Al-

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* Pet—Refers to Petition for writs of certiorari and supporting brief.

DJR—refers to pages of Record in Declaratory Judgment case (No. 549).

QTR—refers to pages of Record in Quiet Title case (No. 550).

burn group had been determined four years before by the Supreme Court of Ohio; that the rights of all the certificate holders had been fixed and that the new litigation was useless and unjustifiable.

Later The Cleveland Trust Company, owning some 160 certificates, and the owners of 77 other certificates sought to intervene in these two suits in order to oppose the petitioners (DJR 30-1-3; QTR 52, 3, 5) but permission was denied because, as the court stated, their viewpoint is being presented by these respondents (hereafter referred to as the "Burdick group").

The Burdick group we believe represent the real interest of all the certificate holders and join with the other respondents in asserting:

(a) That the decisions of the lower courts were sound and just under the State law;

(b) That in view of the fact that the petitioners had a full and fair hearing in these cases with respect to the subject matter brought before the courts, no Federal question is presented as a basis for allowance of the writs prayed for.

We offer brief discussion of this matter here in order to minimize repetition of matter brought to the court's attention in the briefs of the trustee, The National City Bank of Cleveland and Union Properties, Inc., the other respondents in these cases. This brief will be directed to the two cases referred to in the joint petition filed in this Court.

FACTS WHICH WERE BEFORE THE OHIO COURTS.

Counsel for other respondents have shown that the *Hart* and the *Cook* cases both involved the same subject matter and the same parties as the Declaratory Judgment and the Quiet Title actions under consideration.

Also they have shown that it is the established law of Ohio that a court will take judicial notice of the record and

proceedings in a case previously before it involving the same subject matter and the same parties.

Therefore the voluminous records in the *Hart* case were before the Supreme Court of Ohio in the *Cook* case and the records of both cases were before it in the instant litigation.

STATEMENT OF FACTS.

The records in the litigation among the parties to this action show that:

1. In 1933 after The Union Trust Company of Cleveland was closed for liquidation holders of 86.55 per cent of the entire land trust certificate issue of 2000 participations in this trust consented to the transfer of the trusteeship to The National City Bank of Cleveland, the present trustee. Every certificate holder had notice, and no one objected. (*Cook* case, 146 O. S. at page 362.)

2. On April 24, 1935 in *Ulmer vs. Fulton*, 129 O. S. 323; 195 N. E. 557 the Supreme Court of Ohio announced its decision that a certain mortgage trust created by a bank out of its own property was invalid, and that the beneficial owners of the trust became general creditors of the bank, then in liquidation.

3. For many months following the *Ulmer* decision *supra*, the certificate holders held meetings to discuss whether it would be to their financial advantage to attempt to invoke the *Ulmer* decision and ask to become general creditors of The Union Trust Company or to retain their interest in the trust property. They took no action because they were doubtful where their advantage lay. (*Cook* case, 146 O. S. at pages 362-3.)

4. On April 21, 1937 Sec. 710-92a General Code of Ohio, the "McIntyre Act," went into effect. Under its terms the Superintendent of Banks of the State of Ohio fixed July 17, 1937 as the last day on which general claims could be filed against The Union Trust Company. No

certificate holder before or since July 17, 1937 up to October 1945 had filed with the Superintendent a claim based on the invalidity of the trust. (*Cook* case, 146 O. S. at pages 360-1.)

5. On Jan. 20, 1941, certain holders, many of whose certificates were bought in the open market *after* July 17, 1937, filed an action in Common Pleas Court of Cuyahoga County, Ohio (the *Hart* case) praying that the trust be found to be void; that The National City Bank as trustee be ordered to convey the trust property to the Superintendent of Banks; and that the certificate holders be found to have general claims against the assets of the bank in liquidation. (*Cook* case, 146 O. S. pages 351, 2, 9 and 360.)

6. On Feb. 9, 1944 the *Hart* case was decided by the Supreme Court of Ohio. In commenting on this decision Judge Turner said in the *Cook* case, 146 O. S. at page 366:

> "The effect of the *Hart* case was to deprive the relators (which means all certificate holders) permanently of any standing, either legal or equitable, as creditors of The Union Trust Company on account of their holding of such certificates. * * * The status of the relators as possible creditors of The Union Trust Company, right or wrong, has now been forever determined by that case." (Parenthetical clause is ours.)

7. On April 27, 1944 the *Cook* case itself was filed by the same group of certificate holders, as a class action in an original mandamus proceeding in the Supreme Court of Ohio. They asked that the Superintendent of Banks be ordered to treat the trust as void. The writ of mandamus was denied.

Judge Turner said (*Cook* case, 146 O. S., page 373):

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law, authorized by Sec. 710-92 and Sec. 710-95 General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by law."

"The Banking Act (Sec. 710-89 *et seq.*) provides a plain and adequate procedure for the liquidation of banks and the determination of all claims arising in the course of such litigation."

8. On May 6, 1946, the Alburn group (a part of the group which brought the *Hart* and *Cook* suits) filed as a class suit the Declaratory Judgment action, one of the cases here involved. (DJR 1.)

On July 10, 1946 the Common Pleas Court of Cuyahoga County, Ohio allowed the Alburn group to intervene and file an answer and cross-petition for the class in the Quiet Title action, also now before this Court. (QTR 25.)

9. On April 10, 1947 these respondents (the Burdick group of certificate holders) asked and later were granted leave to intervene in both cases, and to file demurrers to the petition in the Declaratory Judgment action and to the answer and cross-petition in the Quiet Title action. (DJR 28-29; QTR 49-50.)

10. In its opinion in passing on the demurrers, the trial court said:

"However under the settled law in the matter, the holders of Land Trust Certificates in connection with the Trust under consideration here are forever barred from asserting claims as general creditors of said Union Trust Company in liquidation. *Stanley et al. v. Hart*, 29 O. O. 35, affirmed in 142 O. S. 528. (DJR 71-2.)

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"A. L. Burdick, *et al.*, intervening parties defendants, oppose the position of plaintiffs in this matter. They represent all holders of certificates similarly situated to themselves. It is significant that all certificate holders do not see eye to eye in a matter instituted ostensibly for the benefit of all. Can it be that the intervening defendants see more clearly the direction in which their best interests lie?

"The holders of certificates have the beneficial ownership of a select piece of Cleveland real estate. The Successor Trustee is an outstanding and reputable

banking concern. They are in as favorable a position as they can hope to be under all the circumstances present, and should let well enough alone.

"It therefore appears to the Court that the matter of the validity or invalidity of the Trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.)

ATTEMPTS TO GET COURTS TO OVERRULE HART CASE.

Under Ohio law all of the evidence, pleadings and decisions in the *Hart* and *Cook* cases were before the Supreme Court of Ohio when motions to certify the records herein were before it.

The history of the effort by petitioners, a small group of certificate holders, to get the courts to overrule the *Hart* case and to upset a trusteeship in which their interest as beneficiaries always has been recognized and protected, was known to the lower court by reason of the previous litigation before it.

It has been known to every Ohio court that has spent time on this litigation since Feb. 19, 1944 when the *Hart* case was finally decided. Nor have the courts been slow to give a name to the efforts of petitioners. Following the first full-dress assault Judge Turner said:

"Relators in plain words are asking this Court now to overrule the *Hart* case."

(*Cook* case, 146 O. S. 368.)

The instant cases represent the second and third efforts. The Court of Appeals in its opinion covering both suits says:

"It is also our view that in these cases plaintiff's petition in the declaratory judgment case and the cross petition in the quiet title case constitute an attempt to secure the overruling of the decision in the *Hart* case." (QTR 80.)

The Supreme Court of Ohio also was in a position to know and properly could take cognizance of the fact that

these suits are additional and costly moves in the long battle to get it to overrule not only the *Hart* case, but a vital part of the *Ulmer* case, *supra*.

In 1935 the *Ulmer* case had decided (Syllabus 4):

> "Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors."

In 1944 the *Hart* case had decided that even if the trust which had been attacked by the Alburn group were found to be invalid, the certificate holders could not be general creditors because they had not filed claims before the deadline established by the McIntyre Act, July 17, 1937.

The Ohio courts, to have found for the petitioners, not only would have been faced with the necessity of overruling the *Hart* case, but also would have been forced to overrule that part of the *Ulmer* case which fixed the rights of beneficiaries of an invalid trust as general creditors.

THE DECISIONS OF THE LOWER COURTS WERE RIGHT.

The *Hart* case had reaffirmed the proposition laid down in the *Ulmer* case that if the certificate holders in this trust could have had any rights against the liquidating bank it would have been as general creditors.

The *Hart* case had established the proposition that these certificate holders could not become general creditors, and the *Cook* case had confirmed it.

The validity of the trust in the 22 years of its existence had not been questioned by anyone except the petitioners. It is not claimed that any other person has questioned it.

In such a situation we submit that the courts were right in sustaining the demurrers on the ground that no cause of action was stated; that the courts were being asked to decide a purely academic question.

In the Quiet Title action petitioners in their cross petition flatly stated that the title and ownership of the property was in the Superintendent of Banks (QTR 32).

Petitioners were therefore again trying to relitigate the issues of the *Hart* case, that is, have the courts declare the trust to be invalid.

While claiming no title or interest in the property for the certificate holders, they are trying to induce the courts to take title from the trustee and give it to a third person, the Superintendent, with whom they claimed no privity. Not claiming any interest in the property the demurrers were properly sustained.

CONSTITUTIONAL RIGHTS OF PETITIONERS WERE NOT VIOLATED.

The petitioners were given full and complete hearings on both actions in all the Ohio courts.

They refer constantly to their "rights," but do not show that any of their constitutional rights have been violated in the normal and ordinary procedure under the Statutes of Ohio.

They say they were "expelled" from the cases. This is their characterization of the fact that they stood on pleadings, found by the Ohio courts to be demurrable, and that, not desiring to plead further, they were non-suited.

Petitioners assert that it was a denial of due process for the Court of Common Pleas to strike the petitioners' answer in the Quiet Title action, although the Burdick group were allowed to remain in the suit. (Pet. 18-19-20.)

The Burdick group, although taking the position that the certificate holders were not proper parties to the Quiet Title action, were allowed to intervene, after another branch of the court had admitted the petitioners.

The Burdick group asserted that they, and not the petitioners, represented all the certificate holders, and accord-

ingly they joined with other respondents in demurring to the answer and cross petition of petitioners.

The demurrers were sustained and on the motion of other respondents the answer of the petitioners was stricken, because it did not state a defense to the trustee's petition. Not desiring to plead further, the court had no alternative except to enter the decree which it did in the Quiet Title action.

Of course the case of *Hansberry vs. Lee,* 311 U. S. 32; 85 L. Ed. 22, cited by petitioners (Pet. 20), is not even remotely an authority for their proposition that the above action was a denial of their right of due process.

In *Hansberry vs. Lee* the first paragraph of the opinion tells the story (page 37):

> "The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment."

The court found that the "earlier litigation" had not been a class action insofar as the petitioners were concerned and that they had been denied due process when the state courts held they were bound by the judgment therein.

CONCLUSION.

Petitioners obviously entertain the hope that if some court will hold that the trust was invalid when created 25 years ago, some magic way can be found to give the certificate holders some rights in the remaining assets of The Union Trust Company, without regard to the fact that the nature of such rights was fixed by the *Ulmer* decision in 1935 and that the possibility of establishing such rights was lost in the *Hart* case in 1944.

Meanwhile petitioners and all certificate holders have been confirmed in their beneficial ownership of the trust property, unchallenged for 25 years by anyone except the Alburn group themselves.

We respectfully submit that no rights of the certificate holders have been infringed; that no certificate holders have been "expelled" from the cases, that no right of due process has been violated, and that no Federal questions are here involved. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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